

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: June 22, 2005 DEPT.71

**REPORTER:
CSR#:**

**HON. RONALD S. PRAGER,
JUDGE PRESIDING**

REPORTER'S ADDRESS:
P. O. Box 128
San Diego, CA 92112-4104

CLERK: K. Sandoval

BAILIFF:

Judicial Council
Coordination Proceedings
No. JCCP 4042

Coordination Proceeding
Title [Rule 1550(b)]
TOBACCO CASES II

BROWN et. al. VS. PHILIP MORRIS U.SA. INC. et al.

TENTATIVE RULING: The Court rules on the motion re: Defendants' election to proceed by appendix in lieu of clerk's transcript under as follows:

CRC Rule 5.1(a)(1), states, in relevant part, as follows: "Within 10 days after the notice of appeal is filed, any party electing to proceed by an appendix under this rule instead of by clerk's transcript under rule 5 must serve and file an notice of election in the superior court...This rule governs unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served."

On November 2, 2004, this Court issued its final rulings granting in part and denying in part Defendants' main motions for summary judgment. On March 7, 2005, this Court decertified the class claims in this action. See Arkin Declaration, Exhibit A. On May 5, 2005, Plaintiffs appealed from that order. Id. at Exhibit B. On May 16, 2005, Plaintiffs filed an Amended Notice of Appeal and their record designation. Id. at Exhibits C and D. On May 24, 2005, Plaintiffs filed an amended record designation. Id. at Exhibit E. On May 26, 2005, Defendants filed an election under CRC Rule 5.1 to proceed with an appendix in lieu of the clerk's transcript in this case. Id. at Exhibit F. On June 3, 2005, further amendments to the record designation were filed. Id. at Exhibit G.

Although Plaintiffs concede that they filed an Amended Notice of Appeal on May 16, 2005, they argue that Defendants' election was untimely. However, the original Notice of Appeal filed on May 5th was defective on its face, as it failed to give notice of an appeal from any properly appealable judgment or order from this Court. Furthermore, under Plaintiffs' interpretation of said Rule, one party could deny the other party's right to make a Rule 5.1 election by amending its Notice of Appeal after the expiration of the original 10-day period.

The appendix procedure “promotes efficiency in appellant’s selection of the superior court documents: When a clerk’s transcript is used, the documents for inclusion must be chosen at the outset of the appeal...but, because an appendix need not be filed until the briefing stage...counsel can select the documents for inclusion while preparing the brief.” See Eisenberg et al, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶4:39, p. 4-9. It also avoids the potential delay by the clerk in preparing the transcript. Ibid.

Here, Plaintiffs argue that the record is too voluminous for them to do an appendix. The Court notes that Plaintiffs designated the record. Given the benefits of the use of the appendix in lieu of a clerk’s transcript noted above, Plaintiffs have not demonstrated the need for shifting the burden of preparing the record to the court clerk. In addition, the Court notes that the conformed copy requirement has been eliminated. See CRC Rule 5.1 [Advisory Committee Comment for CRC Rule 5.1(c)]; See also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶4:210, p.4-47.

Based on the foregoing, the motion is DENIED.

IT IS SO ORDERED.